United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

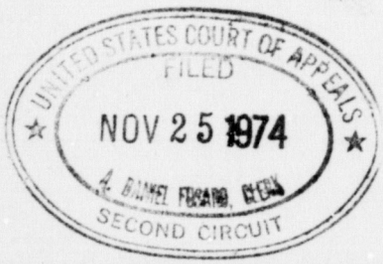
ORIGINAL B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-2169

ELMER BERNSTEIN, CHARLES ALBERTINE, JEFF ALEXANDER, PAUL BEAVER, ALAN BERGMAN, MARILYN BERGMAN, BENNY CARTER, ALEXANDER COURAGE, LUCHIE DE JESUS, GEORGE DEL BARRIO, ROBERT DRASNIN, JACK ELLIOTT, RAY EVANS, PERCY FAITH, RALPH FERRARO, JERRY FIELDING, SIDNEY FINE, CHARLES FOX, JERRY FRIED, HERSCHEL BURKE GILBERT, NORMAN GIMBEL, ERNEST GOLD, WILLIAM GOLDENBERG, JOHN GREEN, DAVID GRUSIN, EARL HAGEN, ARTHUR HAMILTON, MARVIN HAMLISCH, RICHARD HAZARD, MAURICE JARRE, J.J. JOHNSON, QUINCY JONES, FRED KARLIN, IRWIN KOSTAL, TYLWYTH KYMRY, PHILLIP LAMBRO, MEL LEVEN, JAY LIVINGSTON, HENRY MANCINI, EDDY L. MANSON, RICHARD MARKOWITZ, GREIG MC RITCHIE, GILBERT MELLE, VIC MIZZY, JOSEPH MULLENDORE, LYN MURRAY, LARRY ORENSTEIN, JOHN PARKER, STUART PHILLIPS, ROBERT O. RAGLAND, DAVID RAKSIN, NELSON RIDDLE, DAVID ROSE, MILTON ROSEN, MILTON SHORTY ROGERS, GEORGE ROMANIS, LEONARD ROSENMAN, WALTER SCHARF, LALO SCHIFRIN, NATHAN SCOTT, BERT A. SHEFTER, RICHARD M. SHERMAN, ROBERT B. SHERMAN, LEO SHUKEN, FRED STEINER, MORTON STEVENS, JOHN ANDREW TARTAGLIA, DUANE TATRO, GEORGE C. TIPTON, DON WOLF, AL WOODBURY, ON BEHALF OF THEMSELVES, AND ALL OTHER PERSONS SIMILARLY SITUATED,

Appellants,



BRIEF OF APPELLANTS'

(Cover Page 1)

Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-6626

-against-

UNIVERSAL PICTURES, INC., TWENTIETH CENTURY FOX FILM, INC. PARAMOUNT PICTURES CORPORATION, METRO-GOLDWYN-MAYER, INC., WARNER BROS. - SEVEN ARTS, INC., COLUMBIA PICTURES INDUSTRIES, INC., WALT DISNEY PRODUCTIONS, INC., UNITED ARTISTS CORPORATION, COLUMBIA BROADCASTING SYSTEM, INC., AMERICAN BROADCASTING COMPANIES, INC., NATIONAL BROADCASTING COMPANY, INC., TRANSAMERICA CORPORATION, GULF & WESTERN INDUSTRIES, INC., KINNEY SERVICES INC., MCA, INC. AND THE ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANTS'

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BRIEF OF APPELLANTS

Preliminary Statement

Appellants, composers of original music and lyrics for motion pictures and television (hereinafter referred to collectively as "composers"), appeal from an order (637a)[1] of the United States District Court for the Southern District of New York by the Honorable Charles L. Brieant, Jr. dismissing the composers' complaint, sua sponte, without trial for lack of subject matter jurisdiction. Judge Brieant's memorandum opinion is reported at 379 F.Supp. 933 (S.D.N.Y. 1974). The latter opinion and a supplemental memorandum (unreported) are reproduced at 579a and 634a, respectively.

The gravamen of the composers' complaint against appellees, the motion picture studios and television producers for whom their music and lyrics are composed (hereinafter referred to collectively as the "producers"), is the imposition of restraints by the producers alleged to be violative of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. Judge Brieant dismissed the complaint having concluded that "this action [arose] out of a labor dispute over which the NLRB has exclusive jurisdiction."

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1. Numbers followed by "a" refer to pages in the appendix.

379 F.Supp. 939.

Issue Presented

Did the District Court err in dismissing the composers' complaint prior to trial in the face of a vigorously disputed question of fact as to whether the composers are independent contractors or employees within the meaning of the National Labor Relations Act (the "Act") where (1) it did not refer to or apply the governing standard; namely, to assess the total factual context in the light of the pertinent common-law agency principles; (2) it ignored two NLRB decisions which, applying that standard, held that such composers are independent contractors (the only two cases considering that question on a trial record); and (3) the facts show that the composers are, and, a fortiori, that they are entitled to a trial to prove they are, independent contractors.

Statement of the Case

This class action against appellees[2] was commenced on

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2. The Association of Motion Picture and Television Producers, Inc. ("AMPTP"), an association to which most of the producers belong, was dismissed as a defendant by stipulation. See the document designated No. 77 in the Index to the Record. Hereinafter references to documents which are part of the record but not reproduced in the appendix will be as follows: "[Description], Doc. No. ___."

February 7, 1972 by 71 composers and lyricists suing on behalf of themselves and all others similarly situated. Jurisdiction is premised upon §§4 and 16 of the Clayton Act, 15 U.S.C. §15 and 26. An order of the District Court dated June 18, 1973 (Doc. No. 54) found that the complaint alleged a class action under Fed.R.Civ.P. 23. A subsequent order dated October 5, 1973 (124a) defined the class as:

> all composers and lyricists, and in the case of deceased composers and lyricists their representatives, who have composed music and/or lyrics for any of the defendants for motion pictures and television shows....

In substance, the composers' complaint (9a) alleges that the producers, acting in concert, refuse to contract for the services of composers except upon certain standard terms imposed by the producers and that the imposition of these standard terms is part of a conspiracy aimed, inter alia, at monopolizing the music publishing industry by preventing the composers and others from entering the industry in violation of the antitrust laws. The standard terms referred to are found in three successive minimum basic agreements negotiated on behalf of the producers by the AMPTP and on behalf of the composers by the Composers and Lyricists Guild of America, Inc. ("CLGA") and are with few exceptions contained in all agreements between individual producers

and composers, or their nominees. These standard terms relate to ownership by producers of the copyrights of the compositions created by the composers for motion picture and television shows. The composers seek to negotiate individually with producers for the right to exploit their respective compositions for use in the music publishing industry, as distinguished from the motion picture television industry, in various forms through various media.

Course of Proceedings and Disposition Below

In July, 1973, the composers filed a motion (131a) seeking (1) to dismiss the producers' affirmative defenses based on the labor exemption of the antitrust laws and the claim of primary and exclusive NLRB jurisdiction and (2) for preliminary injunctive relief.[3] The composers' motion to strike the affirmative defense of NLRB jurisdiction and for a preliminary injunct-

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3. By a stipulation dated September 21, 1973, so ordered by the District Court (126a), the composers' claims against Columbia Broadcasting System, Inc. ("CBS"), which has always maintained that composers are independent contractors, were severed from those against the other producer-defendants. CBS has never answered the complaint nor, until proceedings on the settlement of an order were had before Judge Brieant (605a), did CBS respond to the composers' motion. In its supplemental memorandum (634a) the District Court concluded that its dismissal of the complaint should, nevertheless, apply to CBS as well as to the other producers.

ion was denied[4] and on its own motion, pursuant to Fed.R.Civ.P. 12(h)(3), the Court dismissed the complaint on the stated ground that the producers' affirmative defenses, which pleaded that primary and exclusive subject matter jurisdiction was vested in the NLRB, were sufficient as a matter of law. 379 F.Supp. 939.

After reviewing the history of the controversy between the composers and producers, the District Court concluded that the composers were employees of the producers rather than independent contractors and then determined that the antitrust claims asserted in the complaint constituted, or at least arguably constituted, an unfair labor practice as defined by §8(a)(5) of the Act, 29 U.S.C. §158(a)(5). In so holding, Judge Brieant relied principally on the recent case of Buckley v. American Fed'n of Television and Radio Artists, 496 F.2d 305 (2d Cir. 1974) (391-93a).

On their motion, the composers relied, inter alia, on two decisions by the NLRB which held on indistinguishable facts that the composers were independent contractors vis-a-vis producers; viz., American Broadcasting Co., 117 N.L.R.B. 13 (1957)

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4. The Court did not reach the merits of the composers' motion for a preliminary injunction and to strike the labor exemption affirmative defenses. In addition, the Court's order was "without prejudice to the rights of those composers, if any, whose claim arose before July 5, 1935 and are not time barred..." 379 F.Supp. 940.

and Alliance of Television Film Producers, Inc., 21-RC-7995 (1963 (unreported decision reproduced in full in Plaintiffs' Brief in Support of Their Motion [Doc. No. 132, pp. 37-8]).

The composers argued that they were independent contractors as a matter of law, and, therefore, both the labor exemption and NLRB jurisdiction defenses interposed by the producers were inapplicable.[5] The motion picture producers argued in response that there was a triable issue of fact as to whether the composers were employees or independent contractors and that the District Court might refer this issue to the NLRB.[6] The producers relied on the AMPTP-CLGA minimum basic agreements and the 1955 certification of the CLGA as the representative of composers "employed" by certain motion picture producers based on a consent election conducted by the NLRB.

As to the television producers, as noted above, CBS which had successfully maintained before the NLRB in American Broadcasting Co., supra, and has maintained to date that the composers are independent contractors, was not a party to the

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5. Plaintiffs' Brief below, Doc. No. 132, p. 33 et seq.; Plaintiffs' Reply Memorandum below, Doc. No. 98, p. 13 et seq. Nevertheless, the composers stated, "If the Court should decide contrary to plaintiffs' contentions that there is need for the presentation of further proofs, both oral and documentary, we respectfully submit that the Court should order a preliminary hearing." Id. at 18.

6. Memorandum in Opposition filed below by the motion picture producers, Doc. No. 119, pp. 20-50.

motion. National Broadcasting Company, Inc. ("NBC") and American Broadcasting Companies, Inc. ("ABC"), both of which were parties in the American Broadcasting Co. case and had argued therein that the composers were independent contractors not subject to NLRB jurisdiction, nevertheless, substantially adopted the motion picture producers' arguments in the Court below.

The District Court did not discuss "the total factual context ... in light of the pertinent common law agency principles," Herald Company v. NLRB, 444 F.2d 430, 433 (2d Cir. 1971), and did not refer to the two NLRB decisions which, applying those principles, concluded that the composers were independent contractors. Concentrating on the earlier consent certification by the Acting Regional Director as to certain motion picture producers and on the negotiations and minimum basic agreements between the CLGA and those producers represented by the AMPTP, the District Court held as a matter of law, without trial, that the composers were and are employees with regard to all appellees. 379 F.Supp. 938. Accordingly, the District Court held that the composers' antitrust complaint alleged what was arguably an unfair labor practice which constituted a "labor dispute" within the exclusive jurisdiction of the NLRB and, as indicated above, dismissed the complaint for lack of subject matter jurisdiction. 379 F.Supp. 939. In its supplemental memorandum opinion, the

Court applied its dismissal to CBS as well stating, "there is no factual distinction between the situation of CBS and that of the other broadcasting defendants. Nomenclature used by CBS, i.e., 'independent contractor', with respect to plaintiffs is irrelevant" (635a).

Thus, the decision to dismiss was applied, without distinction, to the following diverse groups of producers: (1) five motion picture producers who were named in the original Acting Regional Director certified unit in the 1955 consent election case;[7] (2) two motion picture producers, not in the original unit, who at one time or another had had contracts, all now expired, with the CLGA;[8] (3) four motion picture producers, not in the original unit, who never had contracts with CLGA;[9] (4) one motion picture producer, MCA, Inc., with respect to which the NLRB had dismissed a CLGA petition in 1963 on the ground that its composers were independent contractors (Alliance of Television Film Producers, Inc., supra) and who never had an agreement with

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7. Columbia Pictures Industries, Inc.; Paramount Pictures Corporation; Twentieth Century-Fox Film Corp.; Universal City Studios, Inc. and Warner Bros. Inc. Since some of these entities have undergone name changes over the years, the names used here and throughout this brief correspond to the appearances in this action.

8. Metro-Goldwyn-Mayer, Inc. and Walt Disney Productions, Inc.

9. Gulf & Western Industries, Inc.; Warner Communications, Inc.; Transamerica Corporation and United Artists Corporation.

the CLGA; (5) one television producer, CBS, with respect to which the NLRB had dismissed the CLGA petition in 1957 on the ground that its composers were independent contractors (American Broadcasting Co., supra) and who never had a contract with the CLGA; and (6) two television producers, NBC and ABC, who maintained in the latter case that the composers were independent contractors and who never had an agreement with the CLGA.

Material Facts

To obtain original music for a motion picture or television show, a producer must retain a composer with the special creative skills and expertise to write music appropriate to the mood and tone of the production. A composer writing music for media other than motion pictures and television traditionally owns the music he creates. He selects a publisher to bring the music to the public by various means and is given certain recapture and other rights if the publisher fails to promote and exploit his work. The common practice is for the composer to share the fees and royalties from publication and performance with his publisher.

As producers of motion picture and television shows, appellees require the right to use the music in these motion picture or television shows. But there are many additional uses

for the music unrelated to the motion picture or television show. In addition to the central theme or song which may be exploited, there are commonly other themes or songs and background music which may readily be exploited, through development by the composer as orchestral, band or choral arrangements, symphonic suites suitable for concert hall performance, and arrangements for various dance media. For the composer to realize fully the value of his work, every advantage must be taken to make use of his musical composition and to disseminate it to the available audiences through various media.

In 1960 and twice thereafter, the CLGA entered into minimum basic agreements with the AMPTP which represented certain producers.[10] A term of these agreements of most significance in the dispute between the composers and the producers is the following provision demanded by the producers in the negotiations leading to the first agreement in 1960, perpetuated by them in the succeeding agreements and continued until the last agreement expired on November 30, 1971 in disagreement over their insistence that the provision be maintained without change:

> The Producer, as employer for hire of the composer, is entitled to and shall

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10. These agreements are reproduced at 250-345a.

> own all rights of every kind and character, without any restriction, limitation or reservation whatsoever, in and to the compositions, and the copyrights therein, and any and all renewals and extensions of such copyrights everywhere in the world, specifically including the copyrights and renewals and extension thereof in the United States ... [Article 11(b)].

This provision codified the producers prior practices.

The rights to the "works" composers create are numerous and divisible. Of fundamental importance is the fact that, as producers of motion picture and television shows, the producers require only the right to use the music in their motion picture or television shows. However, ownership of all rights includes the right to publish the compositions as sheet music, records, tapes, cartridges, and the like and to license the performance of music on radio, television and in public exhibition halls by orchestras, bands and other musical groups as well as vocalists. None of these rights are directly associated with the production of motion picture and television shows and none of them are used by appellees as producers.

Since appellees as producers do not and cannot exploit all the rights in the music created by the composers, they invariably sell, transfer, or assign the copyright to a music publisher of their choice who thereby acquires a preferred

position in the music publishing market. The composers are required under the terms of their individual contracts with the producers to acknowledge that they have no voice in the selection of the music publisher and that the music publisher selected by the producers has no obligation to them to publish the music.

The assignee-music publishing companies, owned in whole or part or controlled by the producers, constitute a major part of the music publishing industry. They are in competition with music publishers who are denied access to the compositions composers create. The composers are likewise denied the opportunity of negotiating composer-publisher agreements with them. To the extent the music publisher selected by the producers fails to exploit a composition, the composer loses whatever additional value his music holds.

The music publishers owned and controlled by the producers do not confine their activities to publication of the music obtained from the composers-appellants. They compete with other music publishers for music created by composers who do not write for the producers. These composers, unrestrained by the standard terms the producers extract from the composer-appellants, are not required to acknowledge that they are employees for hire. Their music is copyrighted in their own name, not in the name of producers called authors and they are in a position to discon-

tinue the composer-publisher relationship if the contract to publish and exploit is not fulfilled by the publisher.

The composers do not challenge the producers' actions in seeking the right to use the music they contract with composers to obtain for their motion picture and television shows. The composers do challenge the producers' actions in combining and conspiring with each other to obtain rights to the music which they do not and cannot use in their business in order to be able to transfer these rights to captive music publishers in another business.

The Composers' Status

The affidavits of six composers (138-66a) submitted in support of the composers' motion below, substantially uncontroverted by the producers, set forth facts pertaining to their relationships with the producers. These facts, briefly summarized below, are virtually the same as those found in the American Broadcasting Co. and Alliance of Television Film Producers, Inc. cases, supra. Composers are engaged on a free lance basis by producers for a particular motion picture or television show to write, arrange and conduct the words for songs and musical themes, scores and background music. Within the limits of an agreed upon completion date, the composer works at his convenience. Whether he completes his assignment in ten or a thousand hours is of no

concern to the producers nor does it have any bearing on the compensation he receives. He is paid for his score not the hours of his labor. He is not required to compose on premises under the producers' control. He is not provided with any "tools of the trade." He generally buys these himself, keeping them in his home or office where he works.

Composers are not paid on a weekly basis. They are not paid bonuses or given raises. They do not receive paid vacations, holidays or sick leave. They are retained by a producer solely for the duration of the production for which they are writing the music. Upon completion, their obligation ends and they contract with another producer for another production. In many instances, composers may be under contract to compose music for two or more producers at the same time.

The manner in which composers are compensated varies according to the terms of each contract. Some contracts provide for a single payment at its conclusion; others provide for installments; and still others provide for deferred payment of a portion of the contract fee. In any event, there is no similarity between these various methods of payment and the periodic wage or salary payments normally made to employees. The producers have pointed to the fact that regardless of the payment provisions of these contracts some composers are subject to withholding of income,

social security and unemployment taxes. However, the rules and regulations of the Internal Revenue Service and other taxing authorities are not determinative of the relationship existing between plaintiffs and defendants. Moreover, composers have it within their own power to eliminate withholding if they so desire. A composer may establish a corporation and have it contract with a producer to furnish the composer's services and the corporation (clearly not an "employee") will not be subject to withholding. Messrs. Elliott, Karlin and Sherman and many other composers have done this.

The NLRB Determinations

In 1955, on the basis of a consent election, the acting Regional Director certified CLGA as representative of a unit of composers of music and/or words in connection with music employed in Los Angeles by nine named motion picture producers, excluding from the unit, inter alia, "all supervisors and independent contractors" (201a). No record or finding was made as to the work status -- whether employee or independent contractor -- of any given composer or group of composers.

In 1957, the CLGA petitioned the NLRB for certification as representative of the composers engaged by ABC, NBC and CBS. In that case, American Broadcasting Co., supra, the networks opposed on the ground that the composers are not employees within

the meaning of the Act, but independent contractors. The Board found that no question affecting interstate commerce existed with respect to ABC and NBC since neither one contemplated engaging composers. As to CBS and its composers, the Board, on substantially the same facts before this Court and in accordance with the networks' contention, held that the composers were independent contractors and dismissed the petition for certification.

Again, in 1963, the CLGA petitioned the NLRB for certification as representative of composers engaged by four producers, including MCA, Inc., an appellee herein. Alliance of Television Film Producers, Inc., supra. Through their representative the respondents in that case also opposed the petition on the ground that the composers were independent contractors. The Board, on the facts set forth above, and in accordance with the respondents' contention, held that the composers were independent contractors and dismissed the petition.

Re Contractual Relations

None of the three television networks named in the complaint -- CBS, NBC and ABC -- have had contractual relations with the CLGA or any other representative of composers. Of the twelve motion picture producers named in the complaint, five

have had no contractual relations with the CLGA or with any other representative of composers.

The remaining seven motion picture producers had contractual relations with the CLGA, negotiated through AMPTP, from 1960 to November 30, 1971 and none since then. These relations were embodied in the three minimum basic agreements. Separate agreements incorporating the terms of those agreements or terms above the minimum were entered into between the producers and individual composers or corporations created by composers for the purpose.

Relations Between CLGA and AMPTP For Seven of the Fifteen Defendants

Briefly, the relations between the CLGA and AMPTP, representing seven of the fifteen motion picture producers, have been as follows. In the 1960 Minimum Basic Agreement, renewed twice thereafter, the CLGA and AMPTP adopted the language of the Board in the American Broadcasting Co., supra, in defining the unit covered by the agreements. The last agreement states that it covers employees and not independent contractors and that an employee is a person under the direction and control of the producer as to the selection of and the manner and means by which the music for the motion picture is to be composed. The term composer is defined in the agreement as a person

employed by the producer for the purpose of composing music and/or lyrics for use in the production of motion picture photoplays. (250a) Thus, on their face the minimum basic agreements conformed to the certification of the Acting Regional Director of a unit of composers "employed" by the motion picture producing companies and excluding independent contractors, and to the subsequent decisions of the Board holding that the composers were independent contractors. Despite these clear distinctions, the agreements, covering only employees, were applied to the composers-appellants herein who are independent contractors under the definition of the Board in the American Broadcasting Co., and Alliance of Television Film Producers, Inc. cases.

In negotiations for renewal of the minimum basic agreement which expired in 1971, the CLGA took the position that the companies represented by the AMPTP were unfairly insisting, pursuant to the minimum basic agreement, that they were entitled to all rights in the compositions the composers were creating, including not only the right to perform the music in timed sequence with their motion pictures or television shows, but also the right to assign all other rights in the compositions to a publisher of their choice for publication and exploitation in another industry, namely the music publishing industry. The CLGA's request in the negotiations that the motion picture pro-

ducing companies agree to allow the composers to retain the ownership of and right to copyright their works while authorizing the motion picture companies to perform the compositions as part of their productions was refused.

As a result, the CLGA filed a charge with the Board claiming that AMPTP was refusing to bargain in violation of §8(a)(5) of the Act and went on strike. In response, the AMPTP likewise filed a charge claiming that the CLGA had failed to give the Federal Mediation & Conciliation Service ("FMCS") 30 days' notice before striking in violation of §8(b)(3). The AMPTP also charged that the CLGA had wrongfully demanded that the AMPTP bargain on a non-mandatory subject of bargaining, namely the ownership of the copyrights to the compositions the composers created in violation of §8(b)(3).

Reviewing the entire record of the proceedings before the Board, the CLGA concluded that the composers, against whom the restraints complained of were being applied, were independent contractors and not employees and that the Board did not have and would not exercise jurisdiction over the charges filed by the CLGA. Accordingly, the CLGA withdrew its charge. The §8(b)(3) charge filed by the AMPTP was dismissed by the Acting Regional Director on his finding that ownership of the copyrights was a mandatory subject of bargaining. He accepted a stipulation

of the CLGA with respect to the §8(b)(3) charge of failing to notify the FMCS before striking as grounds for dismissing that charge, but he specifically acknowledged that the stipulation constituted no admission by the CLGA that it had committed an unfair labor practice or that the Board had jurisdiction of the dispute.

The NLRB has now accepted a CLGA petition for unit clarification, the Board having denied the motion picture producers' motion to dismiss the petition. The issue in this proceeding, to be tried before a Board hearing officer, is whether the composers engaged by the seven movie producers, who have had collective contracts with CLGA, are employees as suggested in the 1955 certification or independent contractors as held in the American Broadcasting Co. and Alliance of Television Film Producers, Inc. cases. Appellants' application of November 6, 1974 to this Court stay the appeal pending a determination in this proceeding was denied (Kaufman, Ch. J. and Anderson, C. J.).

Argument

POINT I

THE DISTRICT COURT ERRED IN HOLDING, WITHOUT A TRIAL, THAT THE COMPOSERS ARE EMPLOYEES, NOT INDEPENDENT CONTRACTORS

The decision below is premised on a conclusion that appellants compose music and lyrics for appellees as employees

rather than as independent contractors.[11] The only question presented on this appeal is whether the District Court erred in holding, without a trial, that the composers are employees, not independent contractors. It is, therefore, sufficient to show that there was a triable issue of fact in this regard to justify reversal.[12] "A litigant has a right to a trial where there is the slightest doubt as to the facts ..." Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945). Also see American Manufacturers Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272 (2d Cir. 1967). Significantly, the producers vigorously urged below that a full trial would be necessary to establish whether the composers were employees or independent contractors. E.g., 183a; Memorandum in Opposition to Plaintiffs' Motion filed by the motion picture producers, Doc. No. 119, pp. 34-40.

This Circuit, following the Supreme Court, has laid down the test for determining whether individuals are "employees" or "independent contractors" within the meaning of §2(3) of the

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11. 379 F.Supp. 938. To the extent that members of the appellant class are in fact independent contractors, the NLRB would be without jurisdiction. See, e.g., NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).

12. Indeed, as urged below, the composers contend that the record before this Court provides ample support for a holding that they are independent contractors as a matter of law.

Act, 29 U.S.C. §152(3).[13] In Herald Company v. NLRB, supra at 432 this Court held as follows:

> Since N.L.R.B. v. United Insurance Co., 390 U.S. 254, 88 S.Ct. 988, 19 L.Ed. 2d 1083 (1968) it has been settled that general agency principles are to be applied in distinguishing between "employees" under Section 2(3) and "any individual having the status of an independent contractor." The Supreme Court held that the N.L.R.B.'s determination that debit agents of an insurance company were "employees" under the common law of agency should have been enforced by the Seventh Circuit. In News Syndicate Company, Inc., 164 N.L.R.B. 422, 423 (1967) the Board articulated the agency test as follows:
>
> > "In determining the status of persons alleged to be independent contractors, the Board has consistently held that the Act required application of the 'right to control' test. Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished the relationship is one of employment, while, on the other hand, where control is reserved only as to the result sought, the result is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative."
>
> Thus we turn to the factual background of the relationship between the "distributors" and the Herald Company in order to assess "the total factual context * * * in light of the pertinent common law agency principles." N.L.R.B. v. United Insurance Co., supra, 390 U.S. at 258, 88 S.Ct. at 991.

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13. Section 2(3) provides in pertinent part as follows: "The term 'employee' shall include any employee ... but shall not include ... any individual having the status of an independent contractor...."

In the only two cases where the NLRB considered and determined the status of the composers engaged by producers, the Board held that composers were independent contractors within the meaning of §2(3) of the Act. In American Broadcasting Co., supra, the Board accepted the contention of CBS that the composers were independent contractors. After reviewing the facts, the Board held as follows:

> The legislative history of the 1947 amendments to the extent here relevant, shows that Congress intended that the Board recognize as employees those "who work for wages or salaries under direct supervision," and, as independent contractors, "those who undertake to do a job for a price, decid how the work will be done ..."[14] Whether or not social security or state and federal income taxes are withheld from the compensation due an individual is not a decisive factor in determining whether that individual is an employee or an independent contractor,[15] nor is the precise terminology used by the parties in describing their relationship controlling. Rather, the Board has consistently held that, in determining the status of an individual, the Act requires the application of the "right to control" test. Thus, where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the

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14. "Los Angeles Evening Herald and Express, 102 N.L.R.B. 103; Columbia Reporting Company, 88 N.L.R.B. 168. See also House of Representatives Report No. 45, page 18 - 80th Congress, 1st Session." (Footnotes 14, 15, 16 and 17 are original Board footnotes renumbered herein.)

15. "Roy O. Martin Lumber Company, Inc., 83 N.L.R.B. 691; Southwest Associated Telephone Company, 76 N.L.R.B. 1105."

result sought, the relationship is that of an independent contractor. The resolution of this question depends upon the facts of each case and no one factor is determinative.[16]

On the basis of the entire record in this case, we are satisfied that the CBS composers sought by the Petitioner are independent contractors, and not employees, within the meaning of Section 2(3) of the Act. Because of the nature of the art of musical compositions, the specifications which CBS transmits to a composer of necessity relate principally to the effects to be produced by the music and not to the manner in which that effect is to be achieved. Although CBS may set a deadline, it otherwise has no control over the working hours, the working conditions or the place of work of the composer. The amount of compensation paid a composer is normally not based upon a weekly or hourly rate. Furthermore, so far as the record shows, CBS at no time exercised, and no longer reserves, the right to require the composers here sought to revise any composition. These composers not only do their creative work in their own homes, but may work for more than one employer at the same time.

Accordingly, with respect to the composers shown to be actually engaged by CBS at the time of the hearing, we find that the degree of control exercised over them in the performance of their work by CBS is insufficient to establish an employer-employee relationship. We find, therefore, that the CBS composers requested by Petitioner are not employees, but are independent contractors.[17] (Emphasis added.)

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16. "H.E. Koontz Creamery, Inc., 102 N.L.R.B. 1619, and cases cited therein."

17. "See Philadelphia Daily News, Inc., 113 N.L.R.B. 91, where the Board held that a cartoonist in the editorial department of the newspaper, who sold three or more cartoons a week to the employer under a contract whereby the cartoonist was compensated on a fee-per-cartoon basis, was an independent contractor. See also Fulton County Glove Manufacturers, Inc., 111 N.L.R.B. 266."

In the subsequent case, Alliance of Television Film Producers, Inc., supra, the Board accepted the contention of MCA, Inc. and other motion picture producers, made through their representative, that the composers were independent contractors. After stating the facts, the Board held as follows:

> We have held that composers performing similar functions were independent contractors rather than employees. Petitioner contends that the record in the instant case is more complete than that previously before the Board, and warrants a contrary conclusion. However, we are satisfied on the basis of this record that any control by the studios involved herein relates to the result sought rather than to the manner or means by which that result is to be accomplished. Accordingly, the degree of control is insufficient to establish an employer-employee relationship, and we find that all composers in the unit sought are independent contractors. We shall therefore dismiss the petition. (Emphasis added.)

Thus, the standard laid down by the Supreme Court and followed by this Circuit, was applied by the NLRB to the work of the composers engaged by motion picture and television producers with the holding that the composers have the status of independent contractors. The work status of the composers as developed in those two NLRB decisions is indistinguishable from their work status as shown by the affidavits submitted to the District Court. Indeed, CBS and MCA, Inc., which prevailed in

those two cases, are parties here and they, along with ABC, NBC and four motion picture producer-appellees succeeded in having the pending unit clarification proceeding before the NLRB dismissed as to them on the ground, as found by the Regional Director, pursuant to stipulation of the parties, that there was no contractual relationship between them and the CLGA.

In Ring v. Spina, 148 F.2d 647 (2d Cir. 1945), the individual defendant playwrights and The Dramatists Guild of the Authors' League of America, Inc. raised §6 of the Clayton Act as a defense to an antitrust action alleging a conspiracy by the playwrights in restraint of trade. The restraint was alleged to have been accomplished by means of the Dramatists Guild's minimum basic agreement which a producer was compelled to sign before he could acquire a license to produce a play written by a Guild member. The court held that like the fisherman in Columbia River Packers v. Hinton, 315 U.S. 143 (1942) and the doctors in American Medical Ass'n v. United States, 317 U.S. 519 (1943), the playwrights were not employees of the producer and that the dispute, concerning the terms under which plays were licensed, was not within the contemplation of §6 of the Clayton Act. Similarly, a dispute over the terms under which composers sell rights to their musical compositions is not within

the ambit of an employer-employee relationship.

The composers are independent contractors dealing in the sale of a commodity -- musical compositions. They are not employees of defendant producers. The matrix of the controversy between the composers and producers does not relate to an employer-employee relationship. As a matter of fact, the minimum basic agreements specifically entitle a composer to repurchase an unused work for the same price he was originally paid by the producer. The right to repurchase would hardly be granted to an employee under a traditional collective bargaining agreement for his services. This right is meaningful only if the contract is viewed, as here it must be, as an agreement for the sale and purchase of a commodity.

The act of creating a musical composition or lyric which takes place in a composer's mind is so personal as to make impossible any control of the composer by the producer of the type exercised by an employer in the traditional relationship. Even if assumed that the producer may, as asserted by the producers, determine the type of music desired, accept or reject themes, decide which sequences of the film will be accompanied by music and by what type of music, require the music to be rewritten, alter the music, and supervise the recording of the music and its integration with dialogue and sound effects in the final version

of the motion picture, the composers still remain independent contractors, since the producers do not exercise control over the manner or means of composing the music as distinguished from control over the end product.

At no point below did the producers discuss supervision and control of the manner or means of composing music. They did not discuss it because it does not exist. Instead, they sought, for example, to diminish the importance of the fact that almost all composers work at home. They claimed this is a matter of personal preference and that the producers furnish facilities to any composer who desires to use them. Nevertheless, when composers work at home, they are not and cannot be under the supervision, direction, or control of the producers. As the Board said, in Alliance of Television Film Producers, Inc., supra "any control by the studios involved herein relates to the result sought rather than to the manner or means by which that result is accomplished."

In Taylor v. Local No. 7, Journeyman Horseshoers, 353 F.2d 593, 596 (4th Cir. 1965), cert. denied, 384 U.S. 969 (1966), the Court held that the farriers there had the status of independent contractors, stating:

> Even some reservation of control to supervise the manner in which the work is done, or to inspect the work during its performance does not destroy the independent contractor relationship where the contractor is not deprived of his judgment in the execution of his duties.

In the case at bar, the producers do not in fact reserve any control over the manner in which the music and lyrics are composed and the composer, as a free lance artist, necessarily retains "his judgment in the execution of his duties." Id.

The producers also laid great stress below upon the words used in their contractual relationship with composers. All of the producers use a form which uses the legal formula for, and labels the composer, an "employee." However, a composer's status is determined not by the words in a contract but by the actual facts of the relationship; "nor is the precise terminology used by the parties in describing their relationship controlling.... The resolution of this question [employee or independent contractor] depends upon the facts of each case and no one factor is determinative." American Broadcasting Co., supra. Accord, NLRB v. A.S. Abell Co., 327 F.2d 1, 7 (4th Cir. 1964).

The fundamental difference between an employee in a traditional relationship with an employer and the composers in their relationship with the producers becomes apparent from a comparison of a traditional collective bargaining agreement and the AMPTP-CLGA minimum basic agreements (250a, 273a and 313a). Traditional agreements cover wages, hours, and working conditions, the accepted mandatory subjects of bargaining. Apart from the agreed upon lump sum (more properly identified as a fee) which

the producers pay composers and provisions for performance fees and royalties, there are no terms in the minimum basic agreements relating to compensation for services.[18] In sharp contrast to the traditional collective bargaining agreement, the minimum basic agreements contain no provisions whatsoever regarding working hours or conditions. The reason is obvious; composers work when and where they please. It may be during the day or the night, on weekdays or holidays, on the ground or in the air, in New York or flying over the North Pole en route from Los Angeles to London. The composers' purchase of group benefits through participation in the industry pension and insurance funds alter the basic relationship. Of far greater significance is the absence from these agreements of provisions for vacations, holidays and sick leave, benefits invariably included in traditional collective bargaining agreements. The producers could not care less about composers' vacations, holidays or sick leave; their only concern is timely delivery of the music.

The minimum basic agreements are not collective bargaining agreements, they are contracts for the sale of a commodity. See Ring v. Spina, supra. The salient portions of these agreements concern the exploitation of the musical compositions, not

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18. The minimum compensation provided in the minimum basic agreements is the quid pro quo for the transfer of a commodity, viz., music and/or lyrics.

the labor of the composers. Through incorporation in the contracts between individual composers and producers, they provide the mechanism by which producers are, in concert, able to retain title to the compositions and the right to assign them to their captive music publishers.

The producers, in urging below that a triable issue was presented, cited two cases as especially pertinent to the present case: United States v. United Scenic Artists Local 829, 27 F.R.D. 499 (S.D.N.Y. 1961) and Braddick v. Federation of Shorthand Reporters, 115 F.Supp. 550 (S.D.N.Y. 1953). In United Scenic Artists, an antitrust action, both sides moved for summary judgment after almost four years of extensive discovery proceedings. The defendant union was alleged to have entered into a conspiracy to restrain trade with some 40 of its members "who enter into individual contracts with producers which call for the payment of a flat fee (and in some instances, in addition, a percentage of the productions profits) for the design of scenery and/or costumes for a particular production." 27 F.R.D. 499. Judge Kaufman noted that the employment question, i.e., whether the so-called contracting designers were employees of the producers or independent contractors, "lies at the crux of the controversy" and continued at 502:

> The determination of this question involves the consideration of a myriad of factors and details.... Although voluminous depositions, exhibits and affidavits have been submitted in connection with these motions, they plainly do not supply the complete information or bring into sharp focus all the elements essential for an informed and intelligent determination.
>
> Thus, for example, there is a sharp factual dispute with respect to perhaps the most important factor in this determination -- the nature of the relationship between the designers and the producers, and the extent and manner of control exercised in practice by the producers over the designers....

His conclusion under these circumstances was that summary judgment could not be granted.

Plaintiffs in Braddick were in the business of servicing the reporting needs of attorneys, governmental agencies, etc In carrying out assignments, they engaged the services of free lance shorthand reporters who were members of the defendant association. Until 1953 plaintiffs and the association had maintained a contractual relationship, the latter being the "exclusive bargaining representative" of its members. In 1953 a dispute arose; the members of the association boycotted and picketed plaintiffs and plaintiffs retaliated with an action for

an injunction and treble damages, charging that the association was not a bona fide labor union. Defendants moved to dismiss the complaint or for summary judgment. Judge Weinfeld held that where an issue as to the status of the association as a labor organization was raised, the "essential question whether its members were true entrepreneurs rather than employees could not be resolved summarily on the basis of the conflicting affidavits but was required to await determination upon trial." 115 F.Supp. 554. He concluded,at 555, with an observation squarely in point:

> It is obvious that before it can be decided what principles of law are to be applied to this case the facts must be established. At the present time these facts are in sharp dispute. An imperfect or uncertain record is too insecure a basis for the resolution of the close, difficult and important legal questions which this case poses. In the circumstances, the motion for summary judgment must necessarily be denied.

The decision below did not consider or apply the governing standard in determining whether individuals are employees or independent contractors; namely, "to assess 'the total factual context ... in the light of the pertinent common law-agency principles.'" Herald Company v. NLRB, supra, at 433. It ignored the two NLRB decisions which, applying that standard, held that the composers engaged by the producers are independent

contractors -- the only decisions considering the status of composers on a trial record. The decision below relied exclusively on the "undisputed history of the underlying disagreement" (379 F.Supp. 938), overlooking the fact that eight of the fifteen defendants have not been members of AMPTP and have had no collective agreements with CLGA, and indeed, that two of them were among the companies which prevailed upon the NLRB to hold that the composers are independent contractors.

The decision below states that the CLGA cannot remove jurisdiction of a dispute from the NLRB by shifting nomenclature. Conversely, the CLGA cannot confer jurisdiction on the NLRB of a dispute by nomenclature, any more than CBS can confer or remove jurisdiction on the NLRB by its nomenclature, as the District Court correctly observed in its supplemental memorandum opinion. Regardless of what individuals or organizations called themselves or are called, the NLRB cannot have jurisdiction of the dispute, preemptive or otherwise, if the composers are not employees. By the clear wording of §2(3) of the Act, the NLRB does not have jurisdiction of the dispute if they are independent contractors. The proper determination of their status depends, not on the selection of one fact, but on the total factual context in light of the common law agency principles.

Although the District Court placed great emphasis on Buckley v. American Fed'n of Television and Radio Artists,

496 F.2d 305 (2d Cir. 1974), which held that the NLRB has pre-emptive jurisdiction over labor disputes which involve or arguably involve unfair labor practices, it declined to follow the composers' suggestion that the more basic issue, i.e., whether the composers were independent contractors or employees, might profitably be referred to the Board while it retained jurisdiction.[19] In this way, the Court's concern for the integrity of the labor laws would have been vindicated without foreclosing the composers, absent an appeal, the possibility of a judicial determination of their antitrust claims. International Ass'n of Heat and Frost Insulators v. United Contractors Ass'n, 483 F.2d 384, 404 (3d Cir. 1973). Also see Carpenters District Council v. United Contractors Ass'n of Ohio, 484 F.2d 119 (6th Cir. 1973).

POINT II

THE DISTRICT COURT'S DICTUM CONCERNING THE PRODUCERS COPYRIGHT LAW DEFENSES WAS UNSOUND

Since the District Court dismissed the complaint for

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19. This suggestion was made during the course of proceedings held before Judge Brieant in connection with the settlement of a final order. (605a). Of course, the applicability of Buckley turns, in the first instance, on whether the dispute involves employees within the jurisdiction of the NLRB or independent contractors.

lack of subject matter jurisdiction, its comments concerning the validity of the producers' "copyright" defenses under the antitrust laws were merely dictum. Accordingly, this issue is not discussed in detail herein. However, brief mention of this subject is warranted. Clearly, the copyright laws do not provide defendants with immunity from the antitrust laws. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. Loew's Inc., 371 U.S. 11 (1962); Watson v. Buck, 313 U.S. 387 (1941); United States v. Griffith, 334 U.S. 100 (1948); Alden Rochelle Inc. v. ASCAP, 80 F.Supp. 888 (S.D.N.Y. 1948); M. Witmark & Sons v. Jensen, 80 F.Supp. 843 (D. Minn. 1948), appeal dismissed sub nom., M. Witmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949).

Ownership of the copyright by the producer, in the absence of contrary agreement with the composer, under the terms of the statute, has no bearing on whether the producers conspired and monopolized in violation of the antitrust laws. The composers create and sell a commodity which the producers purchase. The dispute between the parties arises out of the composers' rejection of the long established practice of the producers by combination and agreement to require composers to forego the opportunity to bargain with them individually to obtain the copyright in the commodity which they have created. Since the dispute is between composers and producers over the terms of a contract for a sale of

property rights in a musical composition, including the copyright, which by the terms of the copyright statute is subject to such agreement, the producers' concerted action of what that copyright term of the agreement with the composers shall be, is a violation of the antitrust laws.

By way of further dictum (379 F.Supp. 936, n.4 and repeated in the supplemental memorandum opinion at 635a) the District Court indicated that certain conduct of the CLGA and the composers, if the composers are independent contractors, "would itself violate the antitrust laws." Since this comment has no bearing on the dismissal of the complaint for lack of subject matter jurisdiction, it should be sufficient to note that the defense of in pari delicto does not defeat an antitrust claim. See Perma Life Mufflers v. International Parts Corp., 392 U.S. 134 (1968). Moreover, the CLGA is not a party to this action nor have any counterclaims been filed against the composers.

Conclusion

It is respectfully submitted that the District Court erred in dismissing the composers' complaint and the judgment below should be reversed.

Respectfully submitted,

BATTLE, FOWLER, LIDSTONE,
JAFFIN, PIERCE & KHEEL
Attorneys for Appellants

New York, New York
November, 1974

STATE OF NEW YORK
COUNTY OF NEW YORK

JAMES GILHOOLY being duly sworn deposes and says: On November 25th, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Kramath, Swaine & Moore Appellee the attorneys for ~~the respondent~~ by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at One Chase Manhattan Plaza New York, New York 10005 Columbia Broadcasting System, Inc

James J. Gilhooly

Sworn to before me this 25th day of November, 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

JAMES GILHOOLY being duly sworn deposes and says: On November 25th, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Cahill, Gordon, Sonnett, Reindel & Ohl Appellee the attorneys for the ~~respondent~~ by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 80 Pine Street New York, New York 10005 National Broadcasting Co, Inc.

James J. Gilhooly

Sworn to before me this 25th day of November, 1974

Theresa Corless

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STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 25th, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Simpson, Thacher & Bartlett, Appellees, Gulf & Western Industries, Inc., MCA Inc., Paramount Pictures Corp., Universal City Studios, Inc. the attorney for ~~the respondent~~ by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at One Battery Park Plaza New York, New York 10004

Bert Myers

Sworn to before me this 25th day of November 1974

Theresa Corless

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COUNTY OF NEW YORK

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Bert Myers

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James J. Gilhooly

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BERT MYERS being duly sworn deposes and says: On November 25th, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Donovan, Leisure, Newton & Irvine the attorney for the ~~respondent~~ appellant by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 30 Rockefeller Plaza New York, New York 10020 Walt Disney Productions, Inc.

Bert Myers

Sworn to before me this 25th day of November, 1974

Theresa Corless

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